

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IVAN C. GOLLMAN,

Defendant-Appellant.

UNPUBLISHED

May 27, 2014

No. 312016

Wayne Circuit Court

LC No. 02-011287-FC

Before: CAVANAGH, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his resentencing of 15 to 25 years (180 to 300 months) for assault with intent to commit murder, MCL 750.83, and two years for possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm in part, reverse in part, and remand for resentencing and amendment of the presentence investigation report (PSIR).

On August 24, 2002, defendant shot Ronnie Smith in the mouth while Smith was walking home from a party. The bullet lodged near Smith's spine and was unable to be removed. Following his conviction, defendant was sentenced on February 18, 2003. He was resentenced on August 26, 2011 and July 23, 2012. This appeal follows the last resentencing.

Defendant argues that offense variables (OV) 3, 4, and 10 were incorrectly scored. We agree, in part. The scoring of OV 4 was erroneous; thus, defendant is entitled to resentencing.

With regard to scoring offense variables, "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

First, defendant challenges the scoring of OV 3 at 25 points. OV 3 should be scored 25 points if the victim suffered life threatening or permanent incapacitating injury. MCL 777.33(1)(c). Here, defendant stuck a gun in the victim's mouth and shot him. The bullet remains lodged in the victim's body, close to his spine, because removal could have resulted in paralysis. While the prosecution did not present medical evidence regarding the victim's injuries, such evidence is not necessary to prove a life threatening or permanently incapacitating

injury. See *People v McCuller*, 479 Mich 672, 697 n 19; 739 NW2d 563 (2007). On the facts in this case, it is clear that the victim suffered life threatening injuries; thus, the court's scoring of OV 3 is affirmed.

Second, defendant challenges the scoring of OV 4 at 10 points. OV 4 should be scored at 10 points when "serious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). While the fact that treatment was not sought is not conclusive, MCL 777.34(2), there must be some evidence of psychological injury on the record to justify the assessment of points. *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012). In this case, there was no record evidence to support the scoring of 10 points; thus, this decision is reversed.

Third, defendant challenges the scoring of OV 10 at 15 points. OV 10 deals with the exploitation of a vulnerable victim and should be scored at 15 points if predatory conduct was involved. MCL 777.40(1)(a). "Predatory conduct" is "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). "Therefore, predatory conduct under the statute is behavior that is predatory in nature, precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action." *People v Kosik*, 303 Mich App 146, 159-160; 841 NW2d 906 (2013) (citations and quotation marks omitted). In this case, the PSIR indicates that defendant had threatened the victim "just weeks prior to the incident. [Defendant] indicated that he was going to do something to him if his friend (Deon) did not give him the money Deon stole from the defendant, while he sold drugs for him." Further, the victim testified at trial that he saw defendant earlier in the evening, before defendant shot him, when defendant walked past him and said: "You're a nasty mother fucker." Then, later in the evening, as the victim was walking down the street, he turned around and, as soon as he turned around, a gun was stuck in his mouth and immediately fired. In light of this evidence, we affirm the scoring of OV 10 at 15 points.

If the trial court would have correctly scored OV 4, defendant's OV total would have been 95 points, not 105 points, placing him in OV level V, not OV level VI. MCL 777.62. Defendant's PRV total is 7, placing him in PRV Level B. See *id.* Thus, instead of a minimum sentence range of 126 to 210 months, defendant's recommended minimum sentence range should have been 108 to 180 months. *Id.* Defendant's sentence was ultimately 180 to 300 months. Although defendant's minimum sentence was within the guidelines range, he is entitled to resentencing because his sentence was based on inaccurate information. See *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010). Therefore, this case is remanded to the trial court for resentencing.

Next, defendant argues that the PSIR should have the victim impact statement completely redacted because the trial court granted defendant's request that it be stricken. We agree.

Defendant requested that the victim impact statement section of the PSIR be stricken because it was provided by the victim's mother, not the victim. The trial court agreed and the victim impact statement was stricken. But the PSIR still includes the victim impact statement, although the court marked an "X" through the statement. Pursuant to MCL 771.14(6) and MCR 6.425, the victim impact statement must be completely removed from the PSIR before it is

transmitted to the department of corrections. Accordingly, we direct the trial court to have the PSIR amended by complete removal of the victim impact statement.

In his Standard 4 brief, defendant argues that OV 3 and OV 4 were improperly scored and we have already addressed those challenges. Defendant also argues that he was denied effective assistance from his appellate counsel because the “agent’s description of the offense” section of the PSIR should have been stricken. After review of this unpreserved claim for errors apparent on the record, we disagree. See *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Ineffective assistance of appellate counsel claims are reviewed in the same manner as ineffective assistance of trial counsel claims. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). To establish the claim, “a defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness and (2) but for counsel’s deficient performance, there is a reasonable probability that the outcome would have been different.” *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

Defendant argues that his appellate counsel was ineffective because he did not challenge the section of the PSIR entitled “Agent’s Description of the Offense.” In a related argument set forth in his Standard 4 brief, defendant claims that the description of the offense was not supported by trial evidence and, thus, should have been stricken from the PSIR instead of relied upon to score OV 10. However, the PSIR specifically indicates that the information for that section “was garnered from the Detroit Police Department’s Investigator’s Report dated 8/25/02.” The PSIR must contain a complete description of the offense, as well as the circumstances surrounding the offense. MCR 6.425(A). At sentencing, the court may consider information contained in the presentencing report, as well as admissions, evidence from the preliminary examination, and evidence from the trial. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012); *People v McDonald*, 293 Mich App 292, 300; 811 NW2d 507 (2011). Defendant’s claim that the information contained in the PSIR must be supported by trial evidence is without merit. Further, on the record before us, defendant has failed to establish that his appellate counsel’s performance fell below an objective standard of reasonableness with regard to this claim. See *Trakhtenberg*, 493 Mich at 51.

Affirmed in part, reversed in part, and remanded for resentencing and amendment of the PSIR. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Michael J. Kelly